IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Chapter VIII, Rule 32(2) (b)
Description of case

Second Appeal No. 536 of 2001
(Old No. 1942 of 81)

The State
Through Collector, Nainital …… Appellant

Versus

Shri Kunwar Sen, Contractor
S/o Shri Moti Ram,
R/o Kashipur …… Respondent

Date of decision: 31st July, 2004

For the approval of:

Hon'ble Mr. Justice P.C. Pant

- Whether the order/judgment should be sent to the reporters for reporting? (Yes)

- Whether the reporters be allowed to see the judgment? (Yes)

(Himanshu)
P.A.

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R/o Kashipur …….. Respondent

Mr. Kailash Tiwari, learned counsel for the State.
None for the respondent.

Hon'ble P.C. Pant, J.

This second appeal has been preferred under Section 100 of Code of Civil Procedure, 1908 and directed against the judgment and decree dated 08.07.1980 passed by the Mr. K.C. Jain, the then, learned Additional District Judge Nainital, in civil appeal No. 117 of 1979 whereby the trial Court's judgment and order dated 26.07.1979 for recovery of Rs. 2,772/- was set aside.

2) Facts giving rise to the present appeal are that in the Court Compound of Sub Divisional Magistrate, Kashipur, a canteen was auctioned on 23.03.1974 by the State (plaintiff-appellant) for the F.Y. 1974-75 and the defendant being highest bidder was given contract to run the canteen for said year on the terms and conditions agreed between the parties. An amount of Rs. 2,140/, the ¼ amount for which the canteen was auctioned was deposited by the defendant-respondent on the very day i.e. 23.03.1974. Rest of the amounts were to be deposited in further three installments viz. Rs. 2,138/- by 23.06.1974, Rs. 2,137 by 23.09.1974 and lastly Rs. 2,315 by 30.12.1974. The defendant-

respondent failed to make deposit of last two installments. Consequently, the auction made in favour of the defendant-respondent was cancelled w.e.f. 23.09.1974 and the canteen was re-auctioned in favour of one Suresh Chandra for Rs. 2,000/- only for the rest of the period. As such the net loss to the State (plaintiff-appellant)was Rs. 2,272/- for which it appears that recovery proceedings were initiated against defendant-respondent as arrears of the land revenue. Against said recovery, defendant-respondent Kunwar Sen instituted a civil suit No.18 of 1975 before Munsif, Kashipur which was decreed on 07.05.1977 restraining the State from realizing the sum as land revenue on the ground that there was no agreement between the parties to realize the disputed sum as arrears of land revenue. On this, the State instituted a regular suit No. 213 of 1977 for recovery of Rs. 2.272/- which was decreed by learned trial Court on 26.07.1979 along with 6% interest per annum. Aggrieved by said decree the defendant-respondent preferred an appeal (civil appeal No. 117 of 1979) which was allowed by the learned lower Appellate Court vide its judgment and order dated 08.07.1980 and the decree of the trial Court was set aside on the ground that the suit No. 213 of 1977 was barred by principle of resjudicata.
In the present appeal the State (plaintiff-appellant) had challenged the said judgment and order dated 08.07.1980.

3) The substantial question of law involved in this appeal is that whether the present suit (No. 213 of 1977) was barred by principle of resjudicata in view of the judgment and decree dated 06.05.1977 passed by learned Munsif, Kashipur between the parties?

4) I have heard learned counsel for the plaintiff-appellant. No one turned up at the time of argument from the said of the defendant-respondent.

5) The only question of law in the present appeal is, if the civil suit No. 213 of 1977 or its findings were barred by the principle of resjudicata in view of the judgment and order dated 06.05.1977 passed in civil suit No.18 of 1975. I have gone through the entire lower Court record of both the suits. As to the auction dated 23.03.1974 of canteen, there is no dispute between the parties. It is also admitted between the parties that defendant-respondent, Kunwar Sen left the canteen in the mid year and did not make payment of Rs. 2,272/- on demand by the State. It is also not disputed between the parties that earlier, before either of the two suits were instituted the State (present) plaintiff-appellant) sought recovery of Rs. 2,272/- as arrears of land revenue and Shri Kunwar Sen (present defendant-respondent) instituted suit No. 18 of 1995 for injunction for restraining the defendant from realizing the sum in question as arrears of land revenue. Said suit was decreed on 07.05.1977 on the ground that the recovery of the dues as land revenue was possible under the U.P. Zamindari Abolition and Land Reforms Act, 1950 only if the same was recoverable under the U.P. Public Moneys (Recovery of dues) Act, 1972 and for that purpose the disputed amount is neither an advance covered under said Act nor there is any agreement clause between the parties permitting the State to recover it as arrears of land revenue. What the trial Court in earlier judgment had found is that there was no agreement between the parties as to the realization of the sum in question as arrears of land revenue; and it nowhere says the amount is not recoverable. Naturally, the State had no option but

to institute the regular suit for recovery before the Civil Court.

As such the subsequent suit which was filed by the State (present appellant) cannot be said to be barred by principle of resjudicata as now the Court has to decide if the disputed sum is due and payable from the defendant-respondent, Kunwar Sen. The same Munsif while deciding the subsequent suit No. 217 of 1977 rightly decreed it for recovery of Rs. 2,272/- As such learned trial Court erred in law by holding that in view of the judgment in the earlier suit the subsequent suit was barred by the principle of resjudicata. Learned lower appellate Court should have appreciated the fact that the need of the subsequent suit has actually arisen due to the finding given in the earlier suit. Therefore, this Court is in full agreement with the submission of learned counsel for the appellant that the view taken by the lower appellate Court is against the law.

6) For the discussions as above, judgment and decree dated 08.07.1980 passed by learned lower appellate Court in civil appeal No. 117 of 1979 is liable to be set aside. Accordingly, the appeal is allowed with costs and impugned judgment and order as mentioned is set aside. The trial Court's judgment and decree dated 26.07.1979 passed in civil suit No. 213 of 1977 is upheld. Let the lower Court record be sent back.

(P.C. Pant, J.)

Dt: 31st July 2004.
H. Negi